

WILMERHALE

November 8, 2017

Honorable Richard M. Berman
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007-1312

Re: *United States v. Usher et al.*, 17 Cr. 19 (RMB)

Dear Judge Berman:

In advance of the conference scheduled for this Thursday, November 9, defense counsel thought it would be helpful to provide the Court with a brief update on the status of discovery and to identify various issues to discuss at the conference. The government has advised that it intends to continue making discovery productions through at least December, including over 200,000 recently discovered chats that have not yet been produced (which would almost double the number of chats in the case). Accordingly, we respectfully request a brief adjournment of the current trial date (June 4, 2018) to the fall of 2018.

I. Update on Discovery

Through Friday, November 3, 2017, the government has produced 25 volumes of material containing approximately two terabytes of data, including 267,000 chats (2.6 million pages); 153,000 emails (1.4 million pages); 143,000 audio files (1,800 audio hours), and transcripts for 250 of these files; and 11,500 spreadsheets of trading data (hundreds of millions of transactions).

The parties have held several meet-and-confer discussions regarding additional categories of potentially discoverable materials, pursuant to which the government intends to provide before the end of December: (1) 385,000 third-party documents in the government's possession that appear to be discoverable based on descriptions in an index provided by the government; and (2) discoverable materials in the possession of the Criminal Division of the Department of Justice (as opposed to the Antitrust Division) and other federal agencies that participated in the investigation of the FX market.

On October 26, the government advised that it recently became aware of the existence of discoverable documents in the custody and control of a third-party financial institution ("Third Party"). This new material consists of approximately 212,000 chats (which will translate to millions of pages), 3,000 audio files, and 4,000 text messages involving defendant Christopher Ashton and the government's chief cooperating witness. The Third Party is continuing to review a substantial portion of these materials for privilege. The government advised us this week that

WILMERHALE

Honorable Richard M. Berman, U.S.D.J.
November 8, 2017
Page 2

the Third Party expects to complete its production of the documents to the government by the end of November 2017.

One final point about discovery bears mention. The government has produced approximately 143,000 audio recordings, of which only a very small fraction (250) have accompanying transcripts. The absence of transcripts, or even summaries or linesheets, makes our review of this extraordinary number of recordings particularly time and resource intensive. The government has advised that it has prepared its own additional summaries of some of these recordings (beyond the approximately 250 transcripts), but that these summaries are protected by the work product privilege, notwithstanding that it is common practice in this District for the government to produce draft transcripts of recordings subject to a stipulation limiting the defense's use of the draft for impeachment purposes.

II. Issues to Discuss at Status Conference

Defendants respectfully request that the parties and the Court discuss the following discovery and other pretrial issues at the conference on Thursday:

1. Discovery/Trial Date: Even prior to the very recent discovery of the Third Party materials (which almost double the number of chats in this case), the volume of productions was enormous. Given that the government expects to continue producing discovery through at least the end of the year, we respectfully request a brief adjournment of the trial date. Assuming the government's timing estimates of its remaining productions hold, we request adjourning the trial to the fall of 2018. The government has indicated it will reserve decision regarding its position on an adjournment.
2. Dispositive Motions/Page Limits: Briefing for dispositive motions is due on November 17, 2017 for defendants' opening brief; December 8, 2017 for the government's response brief; and December 18, 2017 for defendants' reply brief. *See* 7/17/17 minute entry. The defendants intend to move the Court for an order allowing the parties to submit briefs longer than those prescribed by Rule 2(C) of Your Honor's Individual Practices. The defendants intend to move on two principal grounds: that the indictment fails to allege an actionable restraint of trade, and that the indictment charges conduct outside the extraterritorial scope of the Sherman Act. At the arraignment on July 17, 2017, Your Honor directed that the three defendants jointly make these two arguments in a single, omnibus motion. We believe that page limits of no more than 40 pages for the opening brief, 40 pages for the brief in opposition, and 15 pages for the reply brief are necessary to adequately address these legal issues. The defendants have approached the government with this proposal and the government has indicated that it does not oppose so long as the government is given an additional week for its opposition.

WILMERHALE

Honorable Richard M. Berman, U.S.D.J.
November 8, 2017
Page 3

We will of course also be happy to discuss any other topics that the Court wishes to address at the conference on Thursday.

Respectfully submitted,

/s/ Heather Tewksbury

Heather Tewksbury
Anjan Sahni
Counsel for Rohan Ramchandani
WilmerHale LLP
7 World Trade Center
New York, NY 10007

Michael Kendall
Mark Gidley
Andrew Tomback
Counsel for Richard Usher
White & Case LLP
75 State Street
Boston, MA 02109

David Schertler
Lisa Manning
Counsel for Christopher Ashton
Schertler & Onorato, LLP
1101 Pennsylvania Avenue, NW, Suite 1150
Washington, D.C. 20004

cc: Jeffrey Martino, Esq., Carrie Syme, Esq., and Stephen McCahey, Esq.
(Department of Justice, Antitrust Division)